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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

AARON KATZ, on behalf of himself and all other persons similarly situated,

Petitioner

against

NOLAN C. ASPINWALL, E. F. HILL, MARY JANET DELONG WALLIS, Administratrix of the Estate of W. L. DELONG, JR., deceased, W. L. FAUCETT, R. J. W. HOBBS, H. E. KOOIMAN, W. E. PRESCOTT, JR., PAUL S. WORRELL,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as filed by Petitioner Aaron Katz, and set forth herein ground why this cause should not be reviewed.

Opinion Below

The Court of Appeals, 459 F.2d 1045, affirmed the judgment and opinion of the District Court for the Northern District of Alabama, 342 F.Supp. 286.

Question Presented

May a minority stockholder be heard to complain for inaction by the parties in interest where a corporation on whose behalf a derivative action was filed was dissolved by judicial decree after notice to all stockholders and full hearing?

Statement of the Case

The judgment below affirmed an order of the United States District Court for the Northern District of Alabama, granting Defendants' Motion for Summary Judgment on the ground that the corporation on whose behalf the action had been brought had been dissolved by judicial decree. The following supplements Petitioner's Statement of the Case:

On January 20, 1970, in an action filed by the Superintendent of Insurance for the State of Alabama, the Circuit Court of Alabama, after notice to stockholders and all interested parties and after full hearing, adjudged the dissolution of United Security Life Insurance Company (USLIC), an Alabama corporation, on whose behalf this action was derivatively filed. A. 133a. Petitioner Katz had appeared, filed written pleadings, and made known the pendency of his derivative action, but did not seek to preserve the continued prosecution thereof. A. 65a. All assets and claims of USLIC (including the claims in the derivative suit) were transferred to Public National Life Insurance Company. A. 133a. The Alabama decree was not appealed. Since the decree of dissolution, no party in interest has intervened or filed any pleading to keep viable the derivative action. No party in interest filed objections to the transfer of assets and claims or to the dissolution of USLIC.

Reasons for Denying the Writ

Petitioner has asserted no decision of another court of appeals in conflict with the decision below, and no important question of federal law has been raised.

The decision below is in accordance with the general law applicable to dissolved corporations, which has been recognized by this Court for nearly 100 years. The rule of law is:

> "The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. Oklahoma Gas Co. v. Oklahoma, 273 U.S. 257, 47 S.Ct. 391, 71 L.Ed. 634; First National Bank v. Colby, 21 Wall. 609, 615, 22 L.Ed. 687; • • ."
>
> *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corporation*
> 302 U.S. 120, 124
> 58 S.Ct. 125, 127 (1937)

The laws of Alabama contain no statutory authority for the prolongation for litigation purposes of the life of a corporation dissolved by judicial decree. (Opinion of District Court, Petitioner's Appendix C). Petitioner's basic contention that the State of Alabama divested the Federal Court of jurisdiction of the stockholders' derivative claim is therefore totally without merit.

Nothing is involved in this case which would permit any erosion of federal securities laws. Plaintiff has had his day in court and took no action in the Alabama Circuit Court

to preserve in USLIC or in himself the continued prosecution of this case. Neither he nor any party in interest, including Public National Life Insurance Company, the transferee of the claims asserted, intervened or filed any pleading in the federal derivative action to protect the viability of the claims asserted. The Ninth Circuit has pointed out what action could have been taken, stating:

> "Upon completion of the merger two means of saving the lawsuit were available, neither of which has so far been taken. One was for Provident as an indispensable party to intervene as party plaintiff. * *
>
> "The other course which would have kept this lawsuit viable following the merger was for some stockholder of Provident to intervene in a derivative capacity and to join Provident as a party defendant, had Provident refused to intervene voluntarily. Gorsuch could have assumed this position by a proper amendment of his complaint and by a motion to join Provident as a defendant, providing he was entitled to, and had surrendered his United stock and become a stockholder of Provident."
>
> *Niesz* v. *Gorsuch*, 9 Cir.
> 295 F.2d 909, 913 (1961)

Furthermore, Petitioner has wholly failed to show any conflict in the circuit courts of appeals. The primary case relied on is a decision of the District Court for the Southern District of New York, *Miller* v. *Steinbach*, 268 F.Supp. 255, which is clearly not in point in that the dissolved corporation there had wrongfully taken part in the acts complained of, and the recovery could go directly to the shareholders of the dissolved corporation, including the plaintiff minority stockholder.

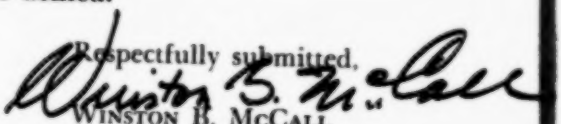
The other cases cited involved the primacy of federal law over state law. This rule of law is not remotely involved

in this case. Alabama has done nothing to impede or override federal law. Alabama has only said that it will not prolong for litigation purposes the life of an Alabama corporation dissolved by judicial decree.

Conclusion

The writ should be denied.

Respectfully submitted,



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Dated: August 31, 1972